STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 8, 2011
v	No. 294706 Kalkaska Circuit Court
BRYAN R. BAIN, Defendant-Appellant.	LC No. 08-014673-OD

Before: O'CONNELL, P.J., and SAAD and BECKERING, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted from the circuit court's order affirming defendant's jury trial conviction in the district court of operating while intoxicated, second offense, MCL 257.625(1). We reverse the circuit court's order, vacate defendant's conviction, and remand to the district court for further proceedings consistent with this opinion. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

I. FACTS

At trial, police sergeant Glenn Artress testified that in the early morning hours of February 24, 2008, he witnessed defendant operating a snowmobile in a careless manner by jumping snow banks and plowed driveways along the north side of M-72. Sergeant Artress pulled defendant over for operating on a non-designated route, and grew suspicious that defendant was intoxicated. Sergeant Artress administered field sobriety tests, most of which defendant failed. Defendant admitted he had consumed alcohol, but no other intoxicants. Blood tests revealed a blood alcohol content of 0.04 grams of alcohol per 100 milliliters of blood, which is well below the legal limit of "0.08 grams or more per 100 milliliters of blood . . . ." MCL 257.625(1)(b).

Jennifer Taggart, a forensic scientist with the Michigan State Police forensic lab, testified that she performed a drug analysis of defendant's blood sample in May 2008 and found the following substances: "THC four nanograms per milliliter, carboxy THC 25 nanograms per milliliter, cocaine 45 nanograms per milliliter, benzoylecgonine 1,220 nanograms per milliliter and detected not quantified cocapropylene and cocaine metabolites." Taggart testified that while defendant had the active drugs marijuana and cocaine in his system, she could not "go into exactly how impaired an individual would be" given the same concentration of drugs as defendant had in this instance. Based on defendant's metabolite levels, Taggart estimated that

the cocaine and marijuana had been ingested within six to twelve hours. The prosecutor asked Taggart if one could legally operate a motor vehicle with either THC or cocaine in the blood, a defense objection was overruled, and Taggart answered, "THC and THC metabolite are both schedule one drugs under the Michigan law. And it is illegal to be operating a vehicle with any amount of those substances in your blood."

In closing argument, the prosecutor described the jury's obligation to determine whether defendant was under the influence as follows:

> You're also going to be asked to determine whether or not [defendant] was under the influence and whether or not he was under an influence of alcohol, any amount of a controlled substance or a combination of alcohol and several controlled substances. Well, after hearing the testimony today and you're going to get to see the evidence, the defendant was under the influence of both alcohol and cocaine and marijuana. And remember the standard in the State of Michigan is any amount. There is no threshold amount. As Jennifer Taggart told you, there is no amount of how much drug it takes to be operating under the influence. If there is [sic] drugs in your system and those drugs are active, you are operating under the influence. Jennifer Taggart told you very clearly that both the cocaine and marijuana in the defendant's system was [sic] active.

There was no defense objection.

The trial court's jury instructions included the following:

> To prove that the defendant operated a motor vehicle while intoxicated, the prosecutor must prove beyond a reasonable doubt that the defendant was under the influence of alcoholic liquor, any amount of a controlled substance or combination of alcoholic liquor and a controlled substance while operating the vehicle. Under the influence of alcohol, any amount of a controlled substance or combination of alcoholic liquor or controlled substance means that the defendant's ability to operate the vehicle in a normal manner was substantially lessened. The test is whether the defendant's mental or physical condition was significantly affected and the defendant was no longer able to operate the vehicle in a normal manner.

Outside the presence of the jury, the judge remarked that the instructions were "a little tricky" and "pretty confusing" because of the drug and alcohol combination, and that she had added to and removed language from the standard jury instruction.[1] Defense counsel

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[1] CJI2d 15.3(2) provides the following definition of under the influence:

> "Under the influence of alcohol" means that because of drinking alcohol, the defendant's ability to operate a motor vehicle in a normal manner was substantially lessened. To be under the influence, a person does not have to be

neither objected to nor expressed his approval of the modified jury instruction, but stated, "[t]hey're [sic] probably come back anyway and ask for another reading."

The jury did return with a question, asking for the definition of "intoxicated," at which point the court added the following:

> I'm going to read to you exactly what the statute says. And it says, that operating while intoxicated means either of the following applies; that the person is under the influence of alcoholic liquor, that's one way, or any amount of a controlled substance, or the third way is or a combination of alcoholic liquor and a controlled substance. . . . So, again, it reads, the person is under the influence of alcoholic liquor—operating while intoxicated means, the person is under the influence of alcoholic liquor, any amount of a controlled substance or a combination of alcoholic liquor and a controlled substance, okay?

The jury later came back with a second question, asking for the definition of "influence," and the court added the following:

> [T]o prove that the defendant operated a motor vehicle while intoxicated, the prosecutor must prove beyond a reasonable doubt that the defendant was either under the influence of alcoholic liquor, any amount of a controlled substance or a combination of alcoholic liquor and a controlled substance. . . . Under the influence of alcohol and/or a controlled substance means the defendant's ability to operate a vehicle in a normal manner was substantially lessened.

Defense counsel neither objected to, nor expressed approval of, the additional instructions. The jury found defendant guilty as charged.

Defendant was charged with violating MCL 257.625(1), which at the relevant time period provided in pertinent part as follows:[2]

> A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor

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> what is called "dead drunk," that is, falling down or hardly able to stand up. On the other hand, just because a person has drunk alcohol or smells of alcohol does not prove, by itself, that the person is under the influence of alcohol. The test is whether, because of drinking alcohol, the defendant's mental or physical condition was significantly affected and the defendant was no longer able to operate a vehicle in a normal manner.

The Use Note to CJI2d 15.3 states that "[i]f the defendant is charged with operating under the influence of a controlled substance or under the influence of a combination of alcohol and a controlled substance, modify this portion of the instruction accordingly."

[2] Some revisions to MCL 257.625 took effect on November 1, 2010, but there were no substantive changes to the provisions here quoted.

> vehicles, including an area designated for the parking of vehicles, within this state if the person is operating while intoxicated. As used in this section, "operating while intoxicated" means either of the following applies:
>
> (a) The person is under the influence of alcoholic liquor, a controlled substance, or a combination of alcoholic liquor and a controlled substance.
>
> (b) The person has an alcohol content of 0.08 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine, or, beginning October 1, 2013, the person has an alcohol content of 0.10 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.

Defendant appealed by right to the circuit court. Among his issues was that the jury instructions invited a finding of guilty not upon concluding that defendant was intoxicated in fact, but upon concluding only that he had even trace amounts of certain substances in his system insufficient to cause intoxication. The circuit court agreed that the district court repeatedly erred in including the words "any amount of a controlled substance" in its instructions, noting that this was more applicable to prosecutions under MCL 257.625(8) than the statute under which defendant was prosecuted, MCL 257.625(1). However, the circuit court, applying plain error review, concluded that reversal was not warranted on the ground that in addition to the erroneous instruction, the jury was nevertheless correctly instructed that conviction required the finding that defendant was "under the influence," meaning that his "ability to operate the vehicle in a normal manner was substantially lessened."

The circuit court additionally concluded that Taggart's statements concerning the illegality of driving with any amount of certain intoxicants in the system was "insignificant because the prejudice would have been cured by the trial court's later instructions that were substantially correct."[3]

On appeal, defendant argues that the testimony from Taggart, the prosecutor's closing argument, and the court's jury instructions suggested that defendant was guilty if he had "any amount" of certain substances in his system and, therefore, denied him a fair trial. We agree.

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[3] Because we are reversing the circuit court and vacating defendant's conviction, we need not address the implications of Taggart's representation that it is illegal to operate a vehicle with carboxy THC in one's system. See *People v Feezel*, 486 Mich 184, 205; 783 NW2d 67 (2010), which overruled *People v Derror*, 475 Mich 316; 715 NW2d 822 (2006) to the extent that it was inconsistent with *Feezel*.

II. STANDARDS OF REVIEW

We review a trial court's evidentiary decisions for an abuse of discretion. *People v Martzke*, 251 Mich App 282, 286; 651 NW2d 490 (2002). An abuse of discretion occurs where the trial court chooses an outcome falling outside a "principled range of outcomes." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). But a court "by definition abuses its discretion when it makes an error of law." *Koon v United States*, 518 US 81, 100; 116 S Ct 2035; 135 L Ed 2d 392 (1996).

A defendant pressing a preserved claim of nonconstitutional error bears the burden of showing that it is more probable than not that the error affected the outcome. *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999), citing MCL 769.26. See also *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999) (appendix).

A defendant pressing an unpreserved claim of error must show a plain error that affected substantial rights. *Carines*, 460 Mich at 763. Where plain error is shown, the reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.*

III. ANALYSIS

The crux of this appeal is that defendant was prosecuted under MCL 257.625(1), which prohibits operation of a motor vehicle while having a blood alcohol level over a certain limit, or doing so while intoxicated in fact, but the jury repeatedly heard talk of "any amount" of controlled substances, which hearkens to MCL 257.625(8), which prohibits operation of a motor vehicle where the operator "has in his or her body any amount of" specified controlled substances. This misleading talk began with Taggart's testimony, as discussed above.

The question properly before the jury in this case was not whether defendant had any amount of certain controlled substances, but whether he exceeded the legal limit for alcohol (which the evidence clearly indicates he did not), or whether the combination of alcohol and other intoxicants impaired his ability to operate his snowmobile in fact.

The prosecutor continued that Taggart "told you very clearly that both the cocaine and marijuana in the defendant's system was active," which indeed she did. But that witness demurred when asked about the extent to which those trace amounts of illegal substances might have caused, or contributed to, any state of intoxication on the occasion in question, which was the relevant inquiry for purposes of a prosecution under MCL 257.625(1).

The jury instructions further perpetuated the error. Again, along with correct instructions concerning intoxication or impairment, the court stated, "[U]nder the influence of alcohol, *any amount of a controlled substance* or combination of alcoholic liquor or controlled substance means that a defendant's ability to operate the vehicle in a normal manner was substantially lessened." (Emphasis added.)

The most logical explanation for the jury's questions concerning "intoxication" and "influence" is that the jurors were confused over the inconsistency of receiving instructions over intoxication in fact but also "any amount" of certain potential intoxicants. But the court failed to

provide the requested clarification, instead answering each question with a reference to "any amount of a controlled substance" in addition to otherwise correct information pertaining to intoxication in fact.

A criminal defendant has a right to have his or her case decided by a properly instructed jury. See *People v Rodriguez*, 463 Mich 466, 472; 620 NW2d 13 (2000). However, imperfect instructions do not require reversal if they nonetheless fairly presented the issues to be tried and adequately protected the rights of the accused. *People v Perez-DeLeon*, 224 Mich App 43, 53; 568 NW2d 324 (1997). "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). But if both a correct and an incorrect instruction are given, this Court presumes that the jury followed the incorrect one. *People v Hess*, 214 Mich App 33, 37; 543 NW2d 332 (1995).

The latter principle is key. The persistent inclusion of "any amount of a controlled substance" language with the jury instructions requires this Court to presume that the jury found defendant guilty of a violation of MCL 257.625(1) not on the basis of a finding that defendant was intoxicated in fact, but on the basis that he had "any amount" of certain controlled substances in his system. This was plain error. As was the prosecutor's reminder in closing argument that Taggart had identified substances in defendant's system any amount of which make it illegal for a person to drive. The trial court's error in overruling objections to that testimony in the first instance started this chain of errors.

Further, because the jury separately sought clarification on how to construe the words "intoxicated" and "influence," the persistence of the instructional error likely affected the outcome. Moreover, because defendant presumably came to trial prepared to defend the charge that he had been legally intoxicated for purposes of subsection (1) of MCL 257.625, in accord with how he was charged, but likely was found guilty on the basis that he had amounts of substances prohibited in any quantity under subsection (8), we hold that the errors seriously affected the fairness and integrity of the proceedings.[4] *Carines*, 460 Mich at 763.

For these reasons, we reverse the circuit court and the district court, vacate defendant's conviction and sentence, and remand to the district court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Jane M. Beckering

[4] A defendant has a constitutional right to adequate notice of the charges against him. *People v Darden*, 230 Mich App 597, 600; 585 NW2d 27 (1998).